

# Request to Release Milosevic Refused

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The initiative to freeze assets has added significance because the U.S. Government is establishing two multi-agency task forces in Chicago and San Francisco to pursue money launderers and a Foreign Terrorist Tracking Center (FTAT) to track assets (see the Gurulé testimony in the U.S. anti-money laundering hearings -- Sec. 1.A). They will give top priority to identifying and blocking the financial activities of terrorists, as well as an existing task force in Los Angeles.<sup>17</sup> The establishment of these task forces, the increased intelligence and law enforcement scrutiny worldwide, along with the increased focus by the media, will enhance awareness of the effort of due diligence with respect to terrorist funds and assets.

## X. LAW OF WAR

### A. Request to Release Milosevic Refused

*by André Klip\**

In a judgement of August 31, 2001 the President of the District Court of The Hague, The Netherlands, declared himself incompetent to consider the request to be released, lodged by Slobodan Milosevic against the host state of the ICTY, the Netherlands.

Milosevic requested the immediate release and return to the Federal Republic of Yugoslavia on the following grounds:

- He was kidnapped in a coordinated action of elements within the Serbian government and the Netherlands. Pending the appeal before the Yugoslav Federal Constitutional Court, the Netherlands should not have admitted Milosevic on its territory;
- The establishment of the so-called Tribunal is not legitimate. The Security Council does not have the power to establish such a Tribunal under the United Nations Charter;
- The so-called Tribunal is not an impartial Tribunal in the sense of Article 6 of the European Convention on Human Rights, since it keeps a friendly relationship with NATO;
- The abolishment of the immunity of heads of state before the ICTY is unprecedented and lacks legal basis;
- Only Dutch courts are competent to judge issues related to the safeguards of individuals on Dutch territory.

The State of the Netherlands argued that all matters related to the detention of accused before the ICTY is within the exclusive competence of the ICTY. As a host state of the Tribunal, the Netherlands only plays a limited role regarding the arrival, transit and departure of persons surrendered to the Tribunal.

The Hague District Court referred to the *Tadic* Jurisdiction Decisions rendered by the ICTY,<sup>18</sup> in which all

<sup>17</sup> Paul Blustein, *New Task Forces Target Terrorist Funding*, WASH. POST, Sept. 20, 2001, at A6, col. 1.

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<sup>18</sup> Decision on the Defence Motion on Jurisdiction, *Prosecutor v. Tadic*, Case No. IT-94-I-T, T.Ch.II, August 10, 1995, André Klip and Göran Sluiter, *Annotated Leading Cases of International Criminal Tribunals*, Vol. I, The International Criminal Tribunal for the Former Yugoslavia 1993-1998, p. 13 and Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadic*, Case No. IT-



issues raised by Milosevic had been discussed. The District Court follows the Appeals Chamber in Tadic and confirms the jurisdiction of the Tribunal to decide on its own jurisdiction and competences.

Regarding the alleged partiality of the ICTY, the District Court refers to the decision of the European Court of Human Rights (ECHR) in the case of *Naletilic v. Croatia*. Naletilic, now also an accused before the ICTY, and also a detainee at the United Nations Detention Unit at The Hague, complained against Croatia, on the ground that his surrender to the ICTY would violate his human rights. The European Court of Human Rights declared the complaint inadmissible.<sup>2</sup> The ECHR regarded the ICTY as "an international court which, in view of the content of its Statute and Rules of Procedure, offers all the necessary guarantees including those of impartiality and independence."

### Commentary

The decision of The Hague District Court is a logical decision that follows the framework of the ICTY Statute, the host state agreement and the ICTY decisions in the *Tadic* case.

The District Court interprets Article 9 of the ICTY Statute concerning primacy also in the sense that it does not allow national courts to interfere with cases pending before the ICTY. In my opinion the District Court erred in this finding. Article 9 of the ICTY Statute deals with the primacy of the ICTY over criminal proceedings before national authorities, and this is only relevant in cases where the ICTY asks for a deferral of the matter. The procedure that took place for The Hague District Court is not a procedure to which Article 9 Statute could apply since it is not a Dutch criminal proceeding against Milosevic, but related to the Netherlands' obligations as the host state of the Tribunal.

It is remarkable that, regarding its competence to hear complaints against the host state on detention, the District Court now takes a different position than a few years earlier in the *Opacic* case.<sup>3</sup> In that case, although it denied the request, it accepted its competence on habeas corpus-related issues. Dragan Opacic had been transferred as a witness to the ICTY from Bosnia but did not want to return to Bosnia.

It is understandable that the District Court does not accept any argument in relation to the alleged partiality of the ICTY. However, on other grounds, reference to the ECHR raises questions regarding the motivation by the ECHR in the *Naletilic* case. How can the ECHR predict and trust that the ICTY as an institution is impartial because the ICTY Statute says so? The ICTY is in this context no more or less than the national courts whose impartiality is open for consideration. There is a presumption that needs to be tested in each individual case. The *Naletilic* decision of the ECHR has the rather exceptional consequence that a specific tribunal as such is regarded as not being able to violate the ECHR in all cases it will deal with. This is rather strange.

Neither the ECHR, nor the District Court of The Hague, dealt with the legal consequences of the fact that Milosevic was brought outside the protection of the European Convention on Human Rights by the Netherlands. Milosevic and other UN detainees cannot, unlike all others within the territory of the Netherlands, lodge a complaint

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94-I-AR72, A.Ch., October 2, 1995, Klip/ Sluiter ALC-I-33.

<sup>2</sup> European Court of Human Rights, *Mladen Naletilic v. Croatia*, Application number 51891/99, May 4, 2000.

<sup>3</sup> Order for the Return of a Detained Witness, *Prosecutor v. Tadic*, Case No. IT-94-I-ST, IT-95-7-Misc. I, T.Ch.II, May 27, 1997, Klip/ Sluiter ALC-I-211. See also District Court of The Hague, *Opacic v. The Netherlands*, May 30, 1997.



with the ECHR if they find that their human rights have been violated.

If the ICTY would violate Milosevic's rights under the ECHR, this may amount to responsibility of the Netherlands under the ECHR. However, this does not mean that the District Court was wrong in declaring its incompetence. Regarding Article 6 ECHR, the ECHR in general may only declare complaints admissible after the violation had occurred and does not rule on possible violations.

*Editor's Note:* On September 28, 2001, officials of the ICTY announced a second (i.e., superseding) indictment has been issued against Milosevic that expand considerably the case against him. Although the indictment has not been made public yet, it apparently deals with Mr. Milosevic's alleged responsibility for events in Croatia in 1991 and 1992, when the federal Yugoslavia was disintegrating. Investigators continue to work intensively on a third indictment against Mr. Milosevic, connecting them to the 1992-1995 war in Bosnia.<sup>4</sup> (bz)

## **B. Greece Finally Starts to Review Accounts Connected to Milosevic**

September 18, 2001, the media reported the Greek Government, specifically its Ministry of Justice, has begun to examine more than 250 accounts held at banks in Athens by companies connected to the former Yugoslav President, Slobodan Milosevic.<sup>1</sup>

The examination responded to a request by the chief prosecutor at the International Criminal Tribunal for the Former Yugoslavia (ICTY) Carla del Ponte. She apparently obtained details of the accounts from Serbian authorities in an effort to trace the Milosevic regime's illegal financial dealings.

According to accounts on September 17, 2001 in *Eleftherotypia*, a Greek newspaper, the accounts were active between 1992 and 1996, when Yugoslavia was subject to international trade sanctions.

The Serbian Government allegedly transmitted customs revenues and income from state-owned companies into the accounts in Greece to purchase weapons for ethnic Serb forces fighting in Bosnia and Croatia.

Initially Cyprus was thought as the main base for illegal accounts of the Serbian Government. The accounts under investigation were held by offshore companies based in Cyprus. Most were held at Greek branches of the Bank of Cyprus, the largest Cypriot bank, and at European Popular Bank, the Greek subsidiary of Popular Bank of Cyprus. Other accounts were kept at three Greek banks: Commercial Bank, Egnatia Bank and Alpha bank.

Earlier this year Greek Central Bank officials accused several Greek banks of unresponsiveness to requests for information about accounts held by Serbia and the former Yugoslavia. An investigation by the Central Bank apparently failed to produce evidence of transactions linked with Mr. Milosevic and members of his family.<sup>2</sup>

The location, tracing, freezing, seizure, and forfeiture of assets have importance because under Article 24(3) with respect to penalties, the Trial Chambers, in addition to imprisonment, "may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners." Presumably the

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<sup>4</sup> Marlise Simons, *New Charges Against Milosevic Tie Him to Croatia War Crimes*, WASH. POST, Sept. 29, 2001, at A3, col. 1.

<sup>1</sup> Kerin Hope, *Greece to Examine Accounts Linked to Milosevic*, FIN. TIMES, Sept. 18, 2001, at 8, col. 8.

<sup>2</sup> *Id.*